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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

—v.—

AMERICAN DENTAL ASSOCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND EQUAL RIGHTS ADVOCATES, INC. IN SUPPORT OF PETITIONER

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28pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

The National Employment Lawyers Association 1

Equal Rights Advocates 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. THE *EN BANC* DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE CIVIL RIGHTS STATUTE 6

II. THE "EGREGIOUS" STANDARD ENDORSED BY THE COURT BELOW UNDERMINES THE DETERRENT VALUE OF PUNITIVE DAMAGES WITH RESPECT TO AN ENTIRE CLASS OF CASES INVOLVING INTENTIONAL DISCRIMINATION 10

III. ANY CONCERNS REGARDING OUTRAGEOUS JURY AWARDS ARE UNJUSTIFIED 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Page(s)

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 10

BMW of North America v. Gore,
517 U.S. 559 (1996) 17, 18

Berry v. Oswalt,
143 F.3d 1127 (8th Cir. 1998) 14

Burlington Indus. v. Ellerth,
524 U.S.__, 118 S. Ct. 2257 (1998) 3

Chevron U.S.A. Inc. v.
Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 7, 8

Clark v. Sims,
894 F. Supp. 868 (D. Md. 1995) 15

Conway Chevrolet-Buick, Inc. v.
Travelers Indemnity Co.,
136 F.3d 210 (1st Cir. 1998) 15

Criado v. IBM Corp.,
145 F.3d 437 (1st Cir. 1998) 5

Daniel v. Loveridge,
32 F.2d 1472 (10th Cir. 1994) 15

Defenbaugh-Williams v. Wal-Mart Stores Inc.,
156 F.3d 581 (5th Cir. 1998) 15

Dichner v. Liberty,
141 F.3d 24 (1st Cir. 1998) 5

Emmel v. Coca-Cola Bottling Co.,
95 F.3d 627 (7th Cir. 1996) 15

Faragher v. Boca Raton,
118 S. Ct. 1115 (1998) 3

Farpella-Crosby v. Horizon Health Care,
97 F.3d 803 (5th Cir. 1996) 15

Ford v. Rigidply Rafters,
984 F. Supp. 386 (D. Md. 1997) 15

Frazier v. Southwestern Pennsylvania Transp. Auth.,
814 F. Supp. 11 (E.D. Pa. 1993) 14

Gares v. Willingboro Township,
90 F.3d 720 (3rd Cir. 1996) 15

Haddle v. Garrison,
No. 97-1472, 1998 WL 856125 (U.S. Dec. 14, 1998) ... 1

Harris v. Forklift Systems, Inc.,
No. 3:89-0557, 1994 WL 792661 (M.D. Tenn. 1994) .. 3

Harris v. L & L Wings, Inc.,
132 F.3d 978 (4th Cir. 1997) 13

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 8, 9, 16

Hernandez-Tirado v. Artau,
874 F.2d 866 (1st Cir. 1989) 4

Howard v. Burns Bros., Inc.,
149 F.3d 835 (8th Cir. 1998) 13

Kimzey v. Wal-Mart Stores, Inc.,
107 F.3d 568 (8th Cir. 1997) 15

Kolstad v. American Dental Ass'n,
139 F.3d 958 (D.C. Cir. 1998) 6, 15

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 7

Luciano v. Olsten Corp.,
110 F.3d 210 (2d Cir. 1997) 2

Mahoney v. Canada Dry Bottling Co.,
94 Civ. 2924 (FB), 1998
WL 231082 (E.D.N.Y. 1998) 14

Martin v. Cavalier Hotel Corp.,
48 F.3d 1343 (4th Cir. 1995) 12

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995) 10

McKinnon v. Kwong Wah Restaurant,
83 F.3d 498 (1st Cir. 1996) 15

McKnight v. Circuit City Stores, Inc.,
No. 3:95CV964, 1997 WL 328638 (E.D. Va. 1997),
rev'd in part on other grounds,
158 F.3d 742 (4th Cir. 1998) 13, 14

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 3

Moskal v. United States,
498 U.S. 103 (1990) 8

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400, 402 (1968) 11

Oncale v. Sundowner Offshore Services, Inc.,
523 U.S. __, 118 S. Ct. 998 (1998) 1

Oubre v. Entergy Operations, Inc.,
___ U.S. ___, 117 S. Ct. 1466 (1997) 1

Poindexter v. Atchison,
1996 U.S. Dist. LEXIS 13160 (D. Kan. 1996) 15

Quaratino v. Tiffany & Co.,
129 F.3d 702 (2nd Cir. 1997) 15

Riverside v. Rivera,
477 U.S. 561 (1986) 10, 11

Rowlett v. Anheuser-Busch, Inc.,
832 F.2d 194 (1st Cir. 1987) 4

Smith v. Wade,
461 U.S. 30 (1983) 8

Soderbeck v. Burnett County,
752 F.2d 285, 289 (7th Cir.),
cert. denied, 471 U.S. 1117 (1985) 4

TXO Production Corp. v. Alliance Resource Corp.,
509 U.S. 443 (1993) 12

Timm v. Progressive Steel Treating, Inc.,
137 F.3d 1008 (7th Cir. 1998) 15

Tison v. Arizona,
481 U.S. 137 (1987) 9

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 5, 8

Vasbinder v. Scott,
976 F.2d 118 (2d Cir. 1992) 6, 18

Wright v. Universal Maritime Corp., __U.S.__,
119 S. Ct. 391 (1998) 1

STATUTES

137 Cong. Rec. H9549 (1991) 7

137 Cong. Rec. H9543 (1991) (Rep. Hyde) 7

137 Cong. Rec. S15473 (1991) (Sen. Dole) 7

42 U.S.C. §§ 1981a 6, 9, 15

Americans With Disabilities Act of
1990, 42 U.S.C. § 12101 *et seq.* 3. 6, 10, 11, 17, 18

Civil Rights Act of 1964,
42 U.S.C. § 2000e *et seq.* 2, 3, 6, 10, 11, 14, 17, 18

Civil Rights Act of 1991, Pub. L.
No. 102-166, § 2(1), 105 Stat. 1071 (1991) 11

H.R. Rep. No. 40(I), 102d Cong.,
1st Sess. 70 (1991), *reprinted in*
1991 U.S.C.C.A.N. 549, 608. ..... 11, 12, 16, 17

INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. NELA has participated as *amicus curiae* in numerous employment cases before the state and federal appellate courts as well as the United States Supreme Court. Recent cases include *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. __, 118 S. Ct. 998 (1998); *Oubre v. Entergy Operations, Inc.*, __ U.S. __, 117 S. Ct. 1466 (1997); *Wright v. Universal Maritime Corp.*, __U.S.__, 119 S.Ct. 391 (1998); *Haddle v. Garrison*, No. 97-1472, 1998 WL 856125 at *1 (U.S. Dec. 14, 1998); and *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997).

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[1] Petitioner and Respondent have consented to the filing of this brief, *amici curiae.* The consents have been filed with the Clerk of this Court. No part of the attached brief has been authored by counsel for either party. No persons other than the *amici curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

NELA has a compelling interest in ensuring that the goals of Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act of 1990 are fully realized. Because of the critical role the awarding of punitive damages plays in the full enforcement of those statutes, NELA submits this brief to protect the interests of its members' clients by ensuring that punitive damages are available under the standards established by the United States Congress.

Equal Rights Advocates

Equal Rights Advocates, Inc. ("ERA") has dedicated itself for the past twenty-four years to achieving equality for women and girls. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA has been particularly concerned with equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. As Title VII is one of the foremost federal laws designed to promote equality in the workplace and protect women from the devastation of discrimination, ERA has a particularly strong interest in the interpretation and implementation of Title VII through the courts. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, No. 3:89-0557,

1994 WL 792661 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 118 S.Ct. 1115 (1998); and *Burlington Indus. v. Ellerth*, 524 U.S.__, 118 S.Ct. 2257 (1998).

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify the proper standard for the awarding of punitive damages under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* and the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* *Amici* propose that the Court reject the position of the District of Columbia Court of Appeals permitting punitive damages only upon a showing that the complained of conduct was "egregious" or "truly outrageous." Such a requirement is not in accord with either the plain language of the statute or the remedial purpose Congress intended when it amended the civil rights statutes to permit juries to award punitive damages.

In its place, *amici* propose that the Court adopt the standard enunciated by the First Circuit when it upheld the following district court jury charge: "Where a plaintiff in a racial discrimination case establishes the elements of malice, or callous indifference by a preponderance of the evidence, then a jury is allowed in its discretion to assess punitive damages against the discriminatory defendant for the purpose of punishment of such

defendant and as a deterrent to others." The First Circuit held that no evidence beyond that which was submitted on liability need be offered to establish entitlement to punitive damages, stating that:

> punitive damages are within the jury's discretion in cases requiring proof of intentional wrongdoing . . . In such cases, the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable. That does not mean that punitive damages are appropriate in each case of an intentional wrong, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 205 (1st Cir. 1987). *See also Hernandez-Tirado v. Artau*, 874 F.2d 866, 868 (1st Cir. 1989), quoting *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985) (jury may award punitive damages where the evidence supports a finding that "the defendant almost certainly knew that what he was doing was wrongful and subject to punishment"); *Criado v. IBM Corp.*, 145 F.3d 437, 445 (1st Cir. 1998); *Dichner v. Liberty*, 141 F.3d 24, 34 (1st Cir. 1998).

The standard enunciated by the First Circuit in *Rowlett* is fully consistent with that established by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Thurston*, this Court stated that "the reckless disregard standard" is met if an employer acts with a "disregard for the governing statute and an indifference to its requirements." 469 U.S. at 127.

The standard *amici* propose is not only consistent with the language of the 1991 Act, but advances its goal of deterring future unlawful conduct. In passing the 1991 Act, Congress recognized that the award of back pay damages alone had failed to impose a significant economic cost on employers who willfully discriminate, particularly in cases where the victim's economic damages were *de minimus*. Deterrence of future unlawful conduct depends upon the availability of punitive damages as a sanction in all cases where an employer discriminates with "malice" or with "reckless disregard" for an employee's protected rights.

Finally, any concern that allowing punitive damages under the standard herein proposed would lead to excessive or "runaway" jury awards is misplaced. Trial courts and appellate courts have the authority to reduce awards that are "so high as to shock the judicial conscience." *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (citations omitted) Given this control, further po-

licing of punitive damages awards is both unnecessary and inappropriate.

ARGUMENT

I. THE *EN BANC* DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE CIVIL RIGHTS STATUTE

The *en banc* decision of the Court of Appeals, *Kolstad v. American Dental Ass'n*, 139 F.3d 958 (D.C. Cir. 1998), which requires victims of discrimination to prove that the acts of the employer were "egregious" and "truly outrageous" to warrant imposition of punitive damages, nullifies the plain language of the statutory provisions for punitive damages. Section 1981a states unambiguously that a victim of discrimination suing under Title VII or the ADA "may recover punitive damages" if she proves that the defendant acted "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. §§ 1981a(a)(1) and (b)(1). Nowhere in the statute are the words, or indeed even the concepts, "egregious conduct," "outrageous behavior" or "outrageous acts of discrimination" to be found. Undoubtedly, those words exist in the lexicon of Congress, but the Members chose not to incorporate them into the

statute.[2] It is not for the courts to now engraft upon the plain language of the statute a higher standard of proof than that stated explicitly by Congress.

This Court has consistently warned against searching the collective mind of Congress when the statutory language is unambiguous. As explained in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> First, always, is the question whether Congress has directly spoken to the precise

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[2] The legislative history supports this conclusion. The congressional debate regarding punitive damages was particularly contentious, where clearly contradictory statements were made along partisan lines. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994). For example, the analysis offered by Rep. Hyde, 137 Cong. Rec. H9543 (1991) and Sen. Dole, 137 Cong. Rec. S15473 (1991) asserting an "extraordinarily egregious" standard, was completely repudiated by Rep. Ford, a sponsor of the bill, who said:

> Mr. Speaker, I listened carefully to the legislative history that the gentleman from Illinois [Mr. Hyde] tried to create for this bill, and, as one of the authors of the bill, I can categorically deny that he was right on any one of his interpretations.

137 Cong. Rec. H9549 (1991).

> question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.

Chevron USA, at 842-43. Further, the words used in the statute should be given their "ordinary meaning." *Moskal v. United States*, 498 U.S. 103 (1990).

Nor is the term "reckless indifference" to protected federal rights in any way ambiguous, thus requiring this Court to search further through the Congressional record for a hidden intent or meaning in the mind of the legislature. To the contrary, this Court has held that it is "not persuaded that a recklessness standard is too vague to be fair or useful." *Smith v. Wade*, 461 U.S. 30, 49 (1983). Since *Smith v. Wade*, this Court has twice endorsed the recklessness standard as the touchstone for punitive damages. *See Thurston*, 469 U.S. at 126-127 (adopting the unambiguous standard of "reckless disregard" of federally protected rights to define what is meant by willful conduct establishing violation of the Age Discrimination in Employment Act); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993). Indeed, if courts require assistance in interpreting the term "reckless indifference," there is an immense body of case law available to them. *See Hazen*, 507 U.S. at 616-17 (employer acts recklessly when he or she "more

likely knows its conduct to be illegal"); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) ("reckless indifference" refers to "the mental state with which the defendant commits the crime"). It would contravene accepted rules of statutory construction to read the terms "egregious" or "outrageous" into the standard for awarding punitive damages.

Congress' incorporation of a provision capping punitive damages[3] based on the size of the defendant employer further supports Petitioner's position that punitive damages do not require proof of egregiousness. Congress drafted Section 1981a to provide that the size of the company controls the award of punitive damages, regardless of the nature or severity of the offense.

When viewed as a whole, the language Congress used in Section 1981a(b)(1) -- "with malice or with reckless indifference to the federally protected rights of an aggrieved individual" -- clearly precludes a requirement of extraordinarily egregious or outrageous conduct for entitlement to punitive damages. Moreover, a plain reading of the statutory language is in full accord with

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[3] Section 1981a(b)(3) provides that a compensatory and punitive damages award shall not exceed $50,000, $100,000, $200,000 or $300,000, depending upon the size of the employer.

the definition of recklessness adopted by this Court in *Thurston* and *Hazen*.

II. THE "EGREGIOUS" STANDARD ENDORSED BY THE COURT BELOW UNDERMINES THE DETERRENT VALUE OF PUNITIVE DAMAGES WITH RESPECT TO AN ENTIRE CLASS OF CASES INVOLVING INTENTIONAL DISCRIMINATION

A primary purpose of federal civil rights legislation is the deterrence of future unlawful conduct. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Such deterrence is best achieved through a statutory scheme which imposes an economic cost on employers who intentionally discriminate. *See Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (noting in the context of a suit under 42 U.S.C. § 1983 that "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future").

Unfortunately, Title VII and the ADA, as originally formulated, were deficient in this regard. A victim of unlawful discrimination who quickly mitigated her back pay damages by locating replacement employment could obtain no monetary relief from the court. Likewise, an employee who incurred slight or *de minimus*

economic injury because she remained in the workplace while suffering harassment or discrimination was unable to obtain any monetary remedy, despite the fact that she vindicated important national civil rights policies through her role as a "private attorney general." *Rivera*, 477 U.S. at 575, citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). These deficiencies led Congress to conclude that the exclusive remedy of back pay constituted "a powerful disincentive for victims to seek to vindicate their rights." H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 70 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608.

In 1991, Congress added punitive damages as a remedy under Title VII and the ADA as a result of a legislative finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (1991). Congress was motivated to expand the law because it recognized that the economic remedies previously available under Title VII, primarily back pay, were frequently insufficient to compensate the victims of discrimination and to insure that meritorious cases were pursued. *See, e.g.* H.R. Rep. No. 40(I), at 68 ("all too frequently, Title VII leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid any meaningful liability");

see also H.R. Rep. No 40(II), at 25-27. The intent of Congress was clear: to impose an economic cost for intentional discrimination where one might otherwise not have existed, thereby establishing a strong remedial mechanism to deter discrimination. Punitive damages are well suited to accomplish this goal, as their fundamental purpose is to cause sufficient financial impact to deter future illegal conduct. *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 459-60 (1993).

The case law and facts bear out Congress' conclusion that an award of back pay damages alone is insufficient to deter intentional discrimination. In an overwhelming number of cases, the actual economic losses are so low -- because the victim effectively mitigated her damages or because she was a low wage worker -- that a recalcitrant employer would find it cost effective to continue to discriminate. A brief survey of cases exemplifies the need for punitive damages to deter future unlawful conduct.

In *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995), the plaintiff was raped and sodomized by her supervisor on several occasions. She was forced to engage in oral sex and anal sex, while held in a locked room by her supervisor. Plaintiff was told by her supervisor that if she did not obey him, she could pack her bags and leave. Plaintiff decided that she could not

take it anymore and quit. She prevailed on most counts in her lawsuit, but her back pay loss was only $22,320.

Likewise, in *Harris v. L & L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997), the two plaintiffs were physically and verbally harassed on an almost daily basis by the floor manager who supervised them. The offensive behavior included incidents of grabbing, swats on the rear end, embracing, stroking their hair, massaging, fondling their legs, following them around the warehouse, boasting about his sexual prowess, offers of promotion or money in exchange for dates or sex, and other vulgar comments by the manager. The plaintiffs were ultimately terminated. Notwithstanding the magnitude of the harassment, the compensatory damages for Harris was merely $6,933 and for Prasky, $5,915.

Similarly, in *Howard v. Burns Bros., Inc.*, 149 F.3d 835 (8th Cir. 1998) the plaintiff was physically and verbally harassed by a co-worker on an almost daily basis. Plaintiff finally quit after management took no steps to act on complaints by her and other women at the company. Plaintiff, however, mitigated her damages immediately by finding a new job. As a result, her compensable economic loss was only $4,400.

In *McKnight v. Circuit City Stores, Inc.*, No. 3:95CV964, 1997 WL 328638, at *1 (E.D. Va. 1997), *rev'd in part on other grounds*, 158 F.3d 742 (4th Cir.

1998) the employer was found liable for race discrimination in promotions. Two of the plaintiffs were awarded a total of only $6,500 in back pay.[4]

In *Frazier v. Southwestern Pennsylvania Transp. Auth.*, 814 F. Supp. 11 (E.D. Pa. 1993) the plaintiff established that defendant violated her rights under Title VII. However, she was awarded only $11,170 in back pay.

Finally, in *Mahoney v. Canada Dry Bottling Co.*, 94 Civ. 2924 (FB), 1998 WL 231082, at *1 (E.D.N.Y. 1998) the plaintiff succeeded on claims that his employer discriminated against him on the basis of his race and his age. However, he was awarded only $6,074 in back pay damages.

The case law is replete with similar incidents of *de minimis* economic damages. *See, e.g. Berry v. Os-*

[4] *McKnight* stands as a disturbing illustration of the importance of punitive damages as a deterrent to discrimination. Despite recognizing that defendant "did not promote [plaintiffs] Lowery and Petersen because of their race," the court of appeals vacated the award of punitive damages because the defendant's conduct was not "so egregious" as to warrant the submission of punitive damages to the jury. The two plaintiffs were left with a total damages award--including compensatory and back pay damages--of only $16,700. *McKnight*, 158 F.3d at 765-768.

walt, 143 F.3d 1127 (8th Cir. 1998) ($40,000 in compensatory damages, no economic damages); *Conway Chevrolet-Buick, Inc. v. Travelers Indemnity Co.*, 136 F.3d 210 (1st Cir. 1998) ($5,000 in compensatory damages); *Defenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581 (5th Cir. 1998) ($19,000 in lost earnings); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998) (no compensatory damages awarded); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($1.00 in back pay); *Ford v. Rigidply Rafters*, 984 F.Supp. 386, 391 (D. Md. 1997) ($46,159 in back pay); *Quaratino v. Tiffany & Co.*, 129 F.3d 702 (2nd Cir. 1997) ($60,000 in compensatory damages); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996) ($43,000 in lost wages); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996) ($7,500 in compensatory damages); *Gares v. Willingboro Township*, 90 F.3d 720 (3rd Cir. 1996) ($24,000 in compensatory damages); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996) ($26,284.29 total back pay for two plaintiffs); *Poindexter v. Atchison*, 1996 U.S. Dist. LEXIS 13160 (D. Kan. 1996) ($36,729 in back pay); *Clark v. Sims*, 894 F. Supp. 868 (D. Md. 1995) ($1.00 in compensatory damages); *Daniel v. Loveridge*, 32 F.2d 1472 (10th Cir. 1994) ($12,360 in back pay). Indeed, Ms. Kolstad herself was awarded only $52,718 in back pay. 108 F.3d 1431, 1435 (D.C. Cir. 1997).

It is clear that if punitive damages are limited to only the most egregious of cases, the deterrent mechanism Congress intended will be eviscerated if not totally nullified. On the other hand, adopting the interpretation compelled by the plain language of Section 1981a will not lead to an award of punitive damages in every case of intentional discrimination. No jury is ever instructed that an award of exemplary damages is required; indeed, as this Court has explained in the context of the Age Discrimination in Employment Act, such damages should not be awarded where "an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular . . . decision . . . ." *Hazen*, 507 U.S. at 616.

However, it is imperative that a jury be permitted to use its own moral compass in assessing whether the employer acted with "malice or with reckless indifference to [the employee's] federally protected rights." The possibility of an award of punitive damages is a keystone of deterrence, for it sends the message that no employer can intentionally discriminate with the knowledge that no jury could ever sanction the conduct. Conversely, denying a jury the ability to award such damages would foster an attitude of impunity among recalcitrant employers and once again leave employees in this country with a civil rights enforcement scheme that

creates "a powerful disincentive for victims to seek to vindicate their rights." H.R. Rep. No. 40(I), at 70.

III. ANY CONCERNS REGARDING OUTRAGEOUS JURY AWARDS ARE UNJUSTIFIED

In opposing jury consideration of punitive damages, Respondent may raise the specter of "runaway" and "excessive" jury awards. That precise argument was rejected by Congress when it amended Title VII and the ADA to allow for jury damage awards. *See* House Rep. No. 40(I), at 65 ("[t]wo decades of experience with monetary damages for intentional race discrimination in employment suggests that damages will neither unduly foster litigation, nor result in disproportionate or "million-dollar" jury awards . . . ."). Congress' decision to allow Title VII and ADA plaintiffs access to a jury of their peers evidences a policy choice that juries, rather than judges, should render moral judgment on a particular employer's conduct.

The ruling by the court below removing that authority from the jury evinces, in essence, a distrust of the jury system at odds with this nation's jurisprudence. *See BMW of North America v. Gore*, 517 U.S. 559, 568 (1996) ("[m]ost States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and

deterrence"); *see also Gore*, 517 U.S. at 613 (Scalia, J., dissenting) (urging deference to "the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury. . . .").

Concerns about excessive jury awards are also unreasonable in light of the existing limitations on an employer's exposure. Punitive damages awarded under Title VII and the ADA are presently capped based on the size of the defendant corporation.

In addition, while it is the job of the jury to set punitive damages, courts are not left without the ability to review certain damage awards. District Court judges are the ultimate gatekeepers protecting against outrageous awards, and, in fact, have exercised their discretion to reduce awards where appropriate, giving due deference to the strictures of the Seventh Amendment. *See Vasbinder*, 976 F.2d at 121.

The above safeguards substantially limit the defendant's financial exposure in employment discrimination litigation. Additional policing of punitive damage awards is neither supported by the language of the 1991 Act nor required by the Constitution, and should be rejected by this Court.

CONCLUSION

For the reasons stated in this brief, *amici* ask this Court to reverse the opinion of the lower court.

Respectfully submitted,

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